

which is referred to the decision of this Court. This is how I read the two sections in conjunction.

In the Case before us, the Judge in the referring Court has not stated any point of law upon which he entertains a reasonable doubt, or what the point of law is, or what his opinion is upon it, and under section 617 I think he must do this before we can deal with the matter. It may be, we do not know, that he has a reasonable doubt upon some point of law. We have, I think, power under section 621 to return the case to the Lower Court for amendment and this course we will adopt.

We refer it back to the Judge in the Court below to say whether there is any point of law upon which he entertains reasonable doubt, and what it is, and what is his own opinion upon it.

STEVENS J. I concur.

SALE J. I agree with the view which has been taken by the learned Chief Justice, of section 69 of the Presidency Small Cause Courts Act, and section 617 of the Code of Civil Procedure. I can only read section 69 of the Presidency Small Cause Courts Act as meaning and contemplating that the opinion to be expressed by this Court is an opinion governed by section 617 of the Code of Civil Procedure. That being so, it seems to me that before this Court can express an opinion upon a case referred under section 69 of the Presidency Small Cause Courts Act, the conditions contained in section 617 must be complied with.

Attorney for the plaintiff : A. C. Ghose.

Attorney for the defendant : H. C. Eggar.

30. C. 463 (=7. C. W. N. 532.)

[463] APPELLATE CIVIL.

SHIB DAS DASS v. KALI KUMAR ROY.* [18th March, 1903.]

Mortgage—Sale of mortgaged property—Money-decree—Transfer of Property Act (IV of 1882) ss. 67, 99—Execution—Purchase by the mortgagee, effect of—Mortgagee, liabilities of—Account.

A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself, and obtained possession through the Court. And in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, *inter alia*, was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act, that the purchase by the plaintiff was null and void, and that the mortgagee was bound to account for the period he was in possession of the mortgaged property.

Held, that, having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession.

Durgayya v. Anantha (1) followed, and *Sri Raju Papamma Rao v. Sri Vira Prutapa Ramachandra Razu* (2) referred to.

[Foll. 4 A. L. J. 787.=A. W. N. 1908, 1.=3 M. L. T. 13=Ref. 33 Cal. 233. Diss. 7 O. C. 314; 8 O. C. 327; 35 Cal. 61=6 C. L. J. 320=11. C. W. N. 1011. F. B.]

* Appeals from Appellate Decrees Nos. 1591 and 1846 of 1899, against the decree of G. Gordon, Esq., District Judge of Chittagong, dated the 26th April 1899, reversing the decree of Babu Jogendra Nath Ray, Subordinate Judge of Chittagong, dated the 27th of July 1898.

(1) (1890) I. L. R. 14 Mad. 74.

29 I. A. 32.

(2) (1896) I. L. R. 19 Mad. 249; L. R.

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SECOND appeal, No. 1591, by Shib Dass Dass, the defendant No. 2; and No. 1846 by Annoda Charan Roy, the defendant No. 1.

These appeals arose out of an action brought by the plaintiffs Kali Kumar Roy and others on a simple mortgage bond, for sale of the mortgaged property. It appeared that on the 26th August 1885, defendant No. 1 mortgaged some 20 drones of land with other land to the plaintiff for Rs. 1,400. On the 5th March 1887 for the interest due on the mortgage bond, the mortgagor conveyed 6 drones of the mortgaged property to the mortgagee, and it was agreed that the mortgage should subsist [464] over some 12 drones of the land originally mortgaged. On the 17th September 1888, defendant No. 2 advanced defendant No. 1 the sum of Rs. 341, and took a mortgage upon part of the abovementioned 12 drones of land. On the 25th July 1889, the plaintiffs, in execution of a decree, upon a claim not arising out of the mortgage, put up the property to sale and purchased it themselves for the sum of Rs. 1,000, took possession of the property under their sale, and registered their names as owners on the 5th June 1891. In the year 1889, when the property was put up to sale, the plaintiffs made a declaration that the purchase would be subject to their mortgage, as also to the mortgage of defendant No. 2. The defendants pleaded, *inter alia*, that inasmuch as the mortgaged property was purchased by the plaintiffs, and as they were in possession for several years, they could not sue to recover the money by the sale of the mortgaged property. The defendant No. 1 also contended that the mortgage debt had been paid off by the usufruct of the mortgaged property of which the plaintiffs were in possession for several years. The defendant No. 2 further contended that the plaintiffs were estopped from bringing the suit as they purchased the property subject to his mortgage, and they subsequently agreed to pay the mortgage debt due to him, and that the suit was not maintainable, as it was a suit to recover money by sale of a portion of the mortgaged property. The Court of First Instance dismissed the plaintiff's suit. On appeal, the District Judge of Chittagong, Mr. G. Gordon, holding that the plaintiffs intended to keep their mortgage alive as against the puisne mortgagee, set aside the decision of the First Court and decreed the plaintiff's suit. The material portion of his judgment, for the purposes of this report, is as follows:—

"The question that remains is whether the appellants (plaintiffs) are entitled to have the property sold in order to satisfy their mortgage, or whether they are in the first place bound to render an account of the sums received by them from the property in question during the years that they have been in possession.

"It appears to me, that the presumption is that the proceeds of the sale of the property would be sufficient to pay off the mortgage debts. If they are insufficient, the respondent No. 2 (defendant No. 2), who has waited so long and allowed both his own claim and that of the appellants to accumulate, is not entitled to any special consideration.

[465] "As regards respondent No. 1 (defendant No. 1), he has already allowed the appellants to hold possession for so long a time that he cannot again set up any claim. There is nothing to show that the price which the appellants originally paid was inadequate.

"I do not, therefore, think that upon consideration of equity the appellants should be compelled to render an account."

Dr. Ashu'osh Mookerji and Babu Soshi Shekhar Bose for the appellant, Shib Dass Dass.

Babu Akhoy Kumar Banerjee for the appellant, Annoda Charan Roy.

Babu Harendra Narain Mitter, Babu Dharendra Lal Khastgir and Babu Amarendra Nath Chatterjee for the respondent.

Cur. adv. vult.

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PRINSEP AND STEPHEN, JJ. The plaintiffs sue on a mortgage to obtain a decree for sale of the mortgaged property in order or realize the amount due. The defendant No. 1 is the mortgagor, and defendant No. 2 holds a second mortgage. It appears that the plaintiffs obtained a decree against the mortgagor on another debt, and in execution of that decree sold the equity of redemption belonging to the mortgagor, bought the property themselves, and obtained possession as auction-purchasers through the Court.

An objection was raised to these proceedings which, it was contended, were contrary to section 99 of the Transfer of Property Act; and it was further contended that the proceedings in that suit and the sale to the plaintiffs were null and void. The terms of section 99 are clearly in favour of this contention, and forbid a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, from attaching the mortgaged property, or bringing it to sale otherwise than by a suit regularly brought under section 67 of the Act. The possession obtained by the plaintiffs was not as mortgagees, but as creditors who had obtained a decree for another debt. The plaintiffs' possession obtained in execution of that decree was therefore not in accordance with law. For this we find authority in the case of *Durgayya v. Anantha* (1) in which [466] we concur. We have also had cited before us the case of *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu* (2). In that case it was held by the High Court that the plaintiff was put into possession in execution of a decree obtained on his mortgage. Their Lordships of the Privy Council, however held that the mortgage did not give the mortgagee the right claimed, and that, consequently, his possession was not a lawful possession so as to bar the right of the mortgagor to redeem. That suit was brought by the mortgagors for possession after taking an account of the rents and profits realized by the mortgagees from the date of their obtaining possession in execution of their decree. The question now before us, which relates to section 99 of the Transfer of Property Act, consequently did not arise in that case, but it is an authority for showing that an account may be taken from a mortgagee, notwithstanding that he may have obtained possession otherwise than in execution of a decree properly obtained.

The District Judge in appeal has refused to allow the profits, realized by the mortgagees during the term of their possession in execution of their decree, to be taken into the account which he has ordered, although, by reason of section 99 of the Transfer of Property Act, the decree by which the mortgagees obtained possession conferred no legal title. It is in respect of this order that appeals have been made separately both by the second mortgagee (defendant No. 2) and by the mortgagor (defendant No. 1). Both these appeals proceed on the same ground, except that in the appeal by the mortgagor an objection has been raised regarding the sum of Rs. 1,000, which was paid by the plaintiffs, the auction-purchasers, of the equity of redemption to him. We are of opinion that in the account to be taken of the amount due on

(1) (1890) I. L. R. 14 Mad. 74.

(2) (1896) I. L. R. 19 Mad. 249; L. R. 23 I. A. 32.

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the mortgage to the plaintiffs which is the first mortgage, the amount realized by them during the period of their possession, as purchasers under the decree obtained by them, should be set off against the amount due under their mortgage, and that on the other hand the plaintiffs-mortgagees are entitled to receive credit for the sum of Rs. 1,000 paid by them as purchasers to the mortgagor. It would be inequitable to allow the mortgagor to [467] retain this money, and at the same time to give him credit for the amount realized by the mortgage during the possession which must be considered as an unlawful possession. The order of the District Judge is accordingly modified in respect of the manner in which the account should be taken. The appellants are each entitled to receive their costs in their respective appeals.

Decree modified.

30 C. 468.

[468] APPEAL FROM ORIGINAL CIVIL.

AGHORE NATH MOOKERJEE v. ADMINISTRATOR-GENERAL OF BENGAL.*
[9th February, 1903.]

Sale—Decree—Execution—Conditions of sale—Title, abstract of, not corresponding with original—Setting aside sale, application for—Purchase-money, return of.

A purchaser of property at the Registrar's sale in execution of a mortgage decree accepted the conditions of sale, whereby he was required to furnish requisitions within ten days after the actual delivery of the abstract of title. The purchaser did not furnish any requisitions.

On the 19th August 1899, by an order of the Court the purchaser was to pay the balance of the purchase-money into Court (he having already made deposit) without prejudice to his right to raise any question as to title or compensation. On the 31st August 1899 the purchaser paid the balance of the purchase-money under compliance of the order of the 19th August 1899. On the 26th April 1900, the purchaser applied for annulment of the sale or for compensation. On the 30th August 1900 the sale was set aside, but that order was reversed on appeal on the 28th February 1902.

After the order of the 28th February 1902, the purchaser asked for inspection of the title-deeds in order to compare them with the abstract, and upon ¹ having certain Persian writing, which he discovered amongst them, read by an expert, found that the abstract of title did not correspond with the original documents of title. The purchaser then having applied to have the sale set aside and his purchase-money refunded :

Held, that the purchaser, though he had not furnished his requisitions within the time allowed by the conditions of sale, was not debarred from applying to the Court to set aside the sale on the ground that the abstract was incorrect and contained a material misdescription; and that he was under the circumstances, entitled to have his purchase-money refunded.

In re Banister (1), *M'Culloch v. Gregory* (2), *Else v. Else* (3), *Upendra Nath Mitter v. Obhoy Kali Dasse* (4) referred to.

APPEAL by the defendant, Aghore Nath Mookerjee.

The defendant, Aghore Nath Mookerjee, purchased for Rs. 12,600 certain property which had been put up for sale by the Registrar of the High Court on the 8th July 1899, in [469] execution of a mortgage decree obtained by the Administrator-General as representative of the mortgagee, Nundo Lall Mullick, and the purchaser deposited Rs. 3,200. One of the conditions of sale being that the

* Appeal from Original Civil No. 29 of 1902 in Suit No. 652 of 1894.

Appellate Bench : Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Sale, and Mr. Justice Stevens.

(1) (1879) L. R. 12 Ch. D. 181, 150.

(2) (1855) 1 Kay and J. 286.

(3) (1871) L. R. 13 Eq. 196.

(4) (1901) 5 C. W. N. 598.